NO. 14512

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED W. STEINER, JOHN W. HADZIMA, ROY PURSSELLEY, NICHOLAS SPICUZZA, OLIVE SPICUZZA, GEORGE TODD and CHARLES WALKER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF

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TOPICAL INDEX

JURISDICTIONAL STATEMENT

ARGUMENT

ARGUMENT, cont'd.

TABLE OF AUTHORITIES CITED

Cases

Cases, cont'd.

Statutes

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JURISDICTIONAL STATEMENT

Statement of Facts

Appellants were indicted for conspiracy to violate Section 545 of Title 18, United States Code, and also on ten substantive counts charging violations of Section 545. (T 3 - 20)

The pertinent part of Section 545 of Title 18, United States Code reads:

> "545. Smuggling goods into the United States. --Whoever knowingly and wilfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice or other document or paper; or
>
> Whoever fraudulently or knowingly

> imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law--
>
> Shall be fined not more than $5,000.00 or imprisoned not more than two years, or both.
>
> (62 Stat. 716, 18 U.S.C. 545)

On September 2, 1953, a motion to dismiss the indictments was argued and denied (T 79, 95-117).

Appellants were brought to trial. The trial court dismissed counts 2 to 7 inclusive of the substantive counts. The jury rendered a verdict finding all of the appellants guilty of conspiracy under count 1. Appellants, Steiner, Hadzima, Nicholas Spicuzza, Pursselley, and Todd were found guilty on all four of the remaining substantive counts. Appellant, Olive Spicuzza, was found guilty on counts 8 and 9 of the substantive counts. Appellant, Walker was found guilty on counts 10 and 11 of the substantive counts.

Defendants filed a motion for new trial (T 20) Said motion was denied (T 64).

Notice of appeal was filed (T 76). Subsequently a designation of points on appeal was filed (T7

Appellant John Hadzima has substituted a separate counsel to represent him on appeal. Therefore, this brief is submitted on behalf of all appellants named herein, excepting John Hadzima.

Jurisdiction of the District Court

The trial court had the jurisdiction to try the alleged offenses charged in the indictment.

> "--The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."
> (62 Stat. 826, 18 U. S. C. 3231)

Appellants deny the indictments were sufficient to state an offense against the United States.

Failure of the indictment to state an offense voids the verdict of the jury and sentence and judgment of the district court. It does not effect the power of the district court. Therefore, the district court had jurisdiction to hear the case.

Jurisdiction of the Appellate Court

Section 1291 of Title 28 of the United States Code vests appellate jurisdiction in the courts of appeals of all final decisions of the district courts of the United States.

The indictments (T 3 et. seq.) constitute the pleadings necessary to prove jurisdiction and venue in the district court hearing the matter.

Questions Involved on Appeal

The issues presented by this appeal are:

1). May appellants be charged in the indictment and convicted of felonies under a general law when the particular acts charged are misdemeanors under a specific law?

2). May appellants be convicted of felonies based on an indictment which charges appellants committed particular acts "contrary to law" without stating the specific law appellants' acts

contravened?

3). Does the term "merchandise", as used in Section 545, Title 18, United States Code, include birds of the psittacine family?

4). Is it error for the trial court to refuse to compel the prosecution to elect which substantive offense, upon which they had offered evidence, they relied upon to prove the specific charges in the counts of the indictment?

5). Were the appellants prejudiced and deprived of a fair trial by the fact that a juror discussed the case with a witness subpoenaed by the government outside the courtroom during the course of the trial?

Manner in which Questions on Appeal were Raised

The question of charging a felony when the act was a misdemeanor under a specific law was raised in a motion to dismiss the indictmen for failure to state an offense under 18 U. S. C. 545 (T 95 et. seq.). The questions of failure of the indictment to state the specific law violated by appellants' acts was raised in the same motic attacking the sufficiency of the indictment.

The question of whether the word "merchandi includes psittacine birds was raised in said moti

The question of electing the substantive offen relied on to prove the counts was raised as on a native motion to the motion to dismiss the substa tive counts on October 15, 1953 (T 35).

The question of misconduct of a juror deprivi appellants of a fair trial was raised in the motio for a new trial (T 20).

Statement of the Case

Appellants were convicted of conspiracy to violate Section 545 of Title 18, United States Code.

Subsequent to the jury's verdict, one of the counsel for appellant received information of misconduct by a juror. Affidavits alleging said misconduct were filed and motion for a new trial submitted. The trial court determined the misconduct was not prejudicial. Appellants contend this ruling of the court was in abuse of its discretion and prejudicial error.

Both before and after trial the court refused to dismiss the indictment and ruled that the indictment sufficiently stated the offenses charged therein. The court concluded that regulations of an executive department, issued pursuant to authority granted by statute, were not of equal dignity with the statute allegedly violated by appellants. Therefore, the court reasoned that the rule that one can not be punished under a general law when his act is punishable under a specific law was not applicable. Appellants contend the conclusion of the court was erroneous and prejudicial i. e. the general statute under which they were prosecuted is a felony while the specific law violated by their alleged acts makes said acts misdemeanors.

The trial court held the Government does not have to elect which substantive counts, it has offered evidence on, upon which it relies to prove the offenses charged. Appellants contend failure to grant their motion to compel an election is prejudicial error. This is so, for without an election, some jurors may rely on certain evidence to prove a specific count, other jurors on other evidence to prove the same count; resulting in an apparently unanimous verdict based on different evidence.

The court ruled that the indictment stated a sufficient offense. Appellants contend this is error in that the term "contrary to law" without

stating the particular law, is too vague and uncertain to state an offense.

Appellants' Specification of Errors

The following errors of law in the district court are specified by appellants as grounds for reversal.

1). Conviction and sentencing of appellants under the provisions of Section 545 of Title 18, United States Code, when the offenses charged were punishable as misdemeanors under a specif law, i. e. Section 271 of Title 42, United States Code.

2). Conviction of appellants of offenses set out in an indictment charging only the commissio of acts "contrary to law" without stating the specific law violated.

3). Conviction of appellants for importing, transporting and receiving psittacine birds contrary to Section 545 of Title 18, United States Code when said psittacine birds are not "merchandise" within the meaning of the word as used in 18 U. S. C. 545.

4). The district court's denial of appellants' motion to compel the Government to elect the substantive offenses, on which evidence was offered, on which they relied to prove the specific charges set out in the indictment's substantive counts.

5). Refusal of the district court to grant appellant's motion for new trial when a juror was guilty of misconduct prejudicial to appellants.

ARGUMENT

I.

APPELLANTS WERE ERRONEOUSLY CONVICTED OF VIOLATING A GENERAL LAW, WHEN A SPECIFIC LAW CONTROLLED.

Appellants were charged with conspiracy to violate both paragraphs of Section 545 in Count I of the indictment (T 2-14). The district court dismissed Counts II, III, IV, V, VI and VII of the indictment at the conclusion of testimony. (T34). Count VIII of the indictment charged importation of psittacine birds contrary to law (T 18). Count IX charged appellants received, concealed and facilitated the transportation and concealment, after importation of psittacine birds, knowing they were imported contrary to law (T 18-19). These offenses allegedly took place April 3, 1952. Count X corresponded to Count VIII and Count XI to Count IX, except the offenses in these counts were alleged to have taken place September 22, 195[illegible]

All four of these substantive counts were based on the second paragraph of Section 545, the "contrary to law" section. It is clear that the two paragraphs of Section 545 define two distinct and separate offenses.

Count I charges a conspiracy to violate 18 U. S. C. Section 545, by importing pscittacine birds without invoicing or declaring same at the port of entry.

To require the appellants to declare illegally imported merchandise violates the privilege against self-incrimination. It is a demand that appellants admit illegal importation or be punished for failure to admit illegal importation. To compel a defandan to admit crime A or be punished for crime B, could not be the intent of the first paragraph of Section 54 Congress intended to compel the declaration of legally imported merchandise. This is borne out by the addition of the second paragraph punishing importation of illegal merchandise. The indictment does not charge a conspiracy to violate any

other law. Thus, no offense is charged unless it is unlawful to import pscittacine birds under Section 545 of Title 18, U. S. C. .

It is a general proposition of law that where a specific law punishes a particular offense, an accused must be punished under that specific law rather than a general law covering the same act, especially if the specific provides a lesser penalty than the general. The specific controls the gener. See United States v. Yuginovich, 256 U. S. 450, 41 S. Ct. 55, 65 L. Ed. 1043 (1920); United State v. Mueller, 178 F. 2d 593 (5th Cir. 1950); Palme v. United States, 112 F. 2d 922 (1st Cir. 1940).

The offenses allegedly committed by appellants are punished by specific laws prohibiting importation of pscittacine birds.

Section 264 of Title 42, United States Code, authorizes the Surgeon General to pass regulations to prevent introduction of communicable diseases into the United States.

Section 264 provides:

> "(a) The Surgeon General... is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, ... of communicable diseases from foreign countries into the States or possessions. ... "

Pursuant to these powers vested in him by Congress, the following regulation was put into force and effect:

> "(b) ... pscittacine birds shall not be brought into the continental United States... " (Sect. 71. 152 (b) of Title 42, United States Code of Federal Regulations)

Since the above regulation is pursuant to 42 U. S. C. 264, it is specifically punished by the terms of Section 271 of Title 42, United States Code.

42 U. S. C. Section 271 provides:

> "(a) Any person who violates any regulation prescribed under ... this title, ... shall be punished by a fine of not more than $1,000.00 or by imprisonment for not more than one year, or both."

Thus importation of pscittacine birds is prohibited and punished by a specific law. If the regulation is not equal to a statute prohibiting importation it is not law. The result would be importation of pscittacine birds would not be contrary to law under the second paragraph of Section 545 of Title 18 U. S. C. and none of the substantive counts in the indictment state an offense. If the regulation prohibiting importation is law, then importation is punishable as a misdemeanor under specific law and it was error to convict and sentence appellants under Section 545. Curione v. United States, 11 F. 2d 471 (2d Cir. 1926) held that the bribery of a customs official under the Tarriff Act was misdemeanor though made a felony under a general bribery section. See also United States v. Reed, 274 Fed. 724 (D. C. N. Y. 1921). Therefore it was error to convict and sentence appellants under the general smuggling law of 18 U. S. C. 545 when the exact offenses alleged in the indictment were punishable under the specific laws of Sections 264 and 271 of Title 42, United States Code.

Further, evidence of Congressional intent to control the offense under the particular law and not the general is shown by the dates of amendment. Section 271 of Title 42 U. S. C. was amended June 25, 1948 (Chap. 646, Sec. 1, 62 Stat. 909). Section 71.152 of Title 42, C. F. R. was amended November 15, 1952 (16 F. R. 11604). 18 U. S. C. 545 was amended June 25, 1948 (C. 645, Sec. 1, 625 Stat. 716). It is based on and substantially the same as former Section 1593 of Title 19, June 17 1930, (C. 497, Title IV, Sec. 593, 46 Stat. 751). Thus Congress must be presumed to have been aware of the effect of their later amendements of

42 U. S. C. 271, i. e. to control the general provisions of 18 U. S. C. 545, since the more recent statute on the same subject repeals prior ones to the extent they cover the same subject.

Where the offense, as here, is a misdemeanor by a specific law, it can not be punished as a felony under the conspiracy statute. Title 18 U. S. C., Section 371 provides in part:

> "If, however, the offense the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

The indictment was challenged for only alleging offenses under 18 U. S. C. 545. The court erroneously denied appellants' motion to dismiss. (T97-

II.

THE INDICTMENT DID NOT STATE A PUNISHABLE OFFENSE IN ALLEGING ONLY THAT ACTS CHARGED WERE CONTRARY TO LAW.

Counts VIII, IX, X and XI of the indictment alle various acts of the appellants to be "contrary to l The counts are couched in the terms of 18 U. S. C. 545. No law is specified in the indictment to have been contravened. Such an indictment states no offense. It is fatally defective for vaugness and uncertainty.

In Babb v. United States, 218 F. 2d 538 (5th Ci 1955), the indictment charged that the defendants had knowingly, wilfully and fraudulently concealed transported, and facilitated the transportation of certain merchandise, to wit: approximately eight head of cattle, after importation, each knowing the same to have been imported and brought into the United States contrary to law. The Babb indictment, like the one in this case, failed to speci

any law contravened. In a unanimous opinion the Court of Appeals reversed the conviction and held that the indictment was totally defective.

In Keck v. United States, 172 U. S. 434, 19 S. Ct. 254, 43 L. Ed. 505 (1898), the indictment charged importation of diamonds contrary to law. The Supreme Court held a charge of importing and bringing into the United States was vague and since it was not illegal per se to import merchandise and only illegal under specific statutes it did not convey the necessary information to the defendant.

In appellants' case the importation of psittacine birds is not illegal per se. 42 C. F. R. 71. 152 (b) (1) (2) provide for the lawful importation of such birds under certain conditions. It is only illegal to import psittacine birds under the specific sections of 42 C. F. R. 71. 152 passed pursuant to 42 U. S. C. 264.

See also United States v. Hess, 124 U. S. 483, 85 S. Ct. 571, 31 L. Ed. 516 (1887).

Appellants respectfully submit that all of the substantive counts in the indictment were fatally defective and the judgment imposed by the court below on said counts should be set aside.

III.

THE TERM "MERCHANDISE", AS USED IN SECTION 545, TITLE 18 UNITED STATES CODE, DOES NOT INCLUDE BIRDS OF THE PSITTACINE FAMILY, AND THEREFORE THE INDICTMENT DOES NOT STATE ANY OFFENSE UNDER SECTION 545, TITLE 18 UNITED STATES CODE, OR THE OFFENSE OF CONSPIRACY TO VIOLATE SAID SECTION.

Count I of the indictment charges one conspiracy between all the appellants to violate

a specific statute, i. e. Section 545 of Title 18 U. S. C. . The indictment nowhere charges a conspiracy to violate any other law.

Counts VIII to XI inclusive of the indictment charge separate violations of Section 545 of Title 18 U. S. C. in that appellants are alleged to have imported and transported psittacine birds contrary to law. The indictment nowhere charges a violation of any other law. Therefore, it is respectfully submitted that if psittacine birds are not merchandise within the meaning of 18 U. S. C. 545, then no count in the indictment states an offense against the United States.

Where a specific law deals with the imported articles, those articles are no longer "merchandise" as that term is used in 18 U. S. C. 545.

Palmero v. United States, 112 F. 2d 922, (1st Cir. 1940).

In United States v. Mueller, 178 F. 2d 593, (5th Cir. 1950), the court held that a specific statute concerning importation of lottery tickets precluded the inclusion of these articles within the definition of the term "merchandise".

In the instant case specific laws deal with psittacine birds and their importation, therefore, they are not "merchandise" within the meaning of 18 U. S. C. 545.

The merchandise dealt with in the specific statute is presumed withdrawn from the general statute by legislative intent.

Appellants respectfully submit that the indictment failed to state any offense against the laws of the United States.

IV.

THE COURT FAILED TO COMPEL THE GOVERNMENT TO ELECT WHICH OF THE MANY SUBSTANTIVE OFFENSES UPON WHICH EVIDENCE HAD BEEN OFFERED THEY RELIED UPON TO PROVE THE SPECIFIC CHARGES IN ALL OF THE COUNTS OF THE INDICTMENT.

Count I of the indictment charges a conspiracy to commit three unlawful acts.

1). Conspiracy to import psittacine birds which should have been invoiced.

2). Conspiracy to import psittacine birds contrary to law.

3). Conspiracy to conceal and transport psittacine birds which had been imported contrary to law.

Counts VIII, IX, X and XI in the indictment charged offenses on April 3, 1952, and September 22, 1952. In the course of the trial a great number of witnesses testified . Their testimony covered a great many different periods of time. It touched on a great number of transactions allegedly engaged in by the appellants. The trial consumed a great deal of time.

Appellants have included a large amount of testimony in the record. The purpose is to show the large number of offenses on which the Government introduced testimony. Note that no specific dates are given as to the commission of the offenses. Thus, different jurors could rely on different offenses to sustain their verdict of guilty on the substantive counts. A motion to compel an election was reasonably presented. The trial judge concluded that

since the motion was made after the government rested it came too late (T 36). The trial judge felt the motion presented was not clearly shown to be one demanding an election.

The motion was not made too late. The motion may be made at the close of the evidence, Thomas v. Hudspeth, 127 F. 2d 976, 978 (10th Cir. 1942). The words quoted in the court's opinion clearly show the nature of the motion made.

> "...I will make a sole motion at this time to compel the government to elect, if any, offenses they choose to rely as far as the substantive counts are concerned." (T 35)

The obvious reason for the rule is that, if no election is made and the jury is not otherwise informed as to which of the offenses, as to which evidence has been introduced, is the offense for which the defendant is on trial, a conviction might result if some of the jurors based their verdict upon the evidence of one of the offenses and the remainder of the jury based their verdict upon the evidence as to a different offense shown by the evidence and the result would be a verdict apparently unanimous, when in fact it was not. See People v. Williams, 133 Cal. 165, 65 Pac. 323 (1901). The reasoning of state courts on the rule is persuasive and the rule is recognized in federal criminal law, Thomas v. Hudspeth, 127 F. 2d 976 (10th Cir. 1942).

IV.

THE APPELLANTS WERE SUBSTANTIALLY PREJUDICED AND DEPRIVED OF A FAIR TRIAL BY REASON OF THE FACT THAT A JUROR COMMITTED MISCONDUCT BY DISCUSSING THE CASE WITH A WITNESS SUBPOENAED BY THE GOVERNMENT OUTSIDE THE COURTROOM DURING THE COURSE OF THE TRIAL.

Appellants filed a motion for a new trial. One of the grounds for a new trial was misconduct by a juror (T 20).

The evidence showed that witness subpoenaed by the Government twice contacted a juror. That they spent considerable time together (T 717). They went to lunch together (T 727). The witness visited the juror in her home (T 739). Another suspicious circumstance was the fact that the witness made several attempts to contact the juror prior to their first conversation (T 738). Both the juror and witness admitted that there was some discussion of the case (T 699-746). All of these events took place during the course of the trial and outside the presence of the court.

United States v. Marine, 84 Fed. Supp. 785, (D. Del. 1949) is a case close in point. There a government witness and juror had lunch together on three successive days. The court stated:

> "The number of times juror Number 7 and Flounders fraternized in the absence of previous acquaintance or any apparent mutual bond is sufficient to raise suspicious implication"...
>
> "It is unnecessary to make a finding whether the case was actually discussed. It is sufficient that the discussion approached the subject matter of the case much more closely than the juror wished to admit."

"It would be impossible in most cases by the very nature of things to prove actual misconduct or that the case was discussed. What influences a particular juror necessarily must be vague and indefinite."
(P. 787)

The improper contacts raised the presumption of prejudice to appellants, Wheaton v. United States, 133 F. 2d 522, 527 (8th Cir. 1943).

See also:

Mattox v. United States, 146 U. S. 140 (1892).
Ryan v. United States, 191 F 2d 779, (D. C. Cir. 1951).
Stone v. United States, 113 F. 2d 70 (6th Cir. 1940).
Sunderland v. United States, 19 F. 2d 202, (8th Cir. 1927).
United States v. Rakes, 74 Fed. Supp. 645, (E. D. Va. 1947).

The trial court examined the juror and contacting witness under oath (T 698 et. seq.) From the testimony of these persons and the trial judges conclusions as to their credibility it was ruled that there was no prejudice (T 45). However, no notice is paid to the fact that the first contact took place October 8, 1953. The court's examination was not made until October 29, 1953. In this length of time the parties might agree on a story. The juror's testimony indicates knowledge that to talk to a witness was improper. (T 730). The juror testified that her deliberations were not effected and she was not prejudiced or influenced. However, no one is naive enough to expect a juror to testify that she was influenced or prejudiced by such remarks. Her testimony is self serving. Any contrary admissions would be implicating.

Note that the witness corroborated testimony of a Government witness. Oscar Jones testified

he made delivery of birds to appellants. He testified he (Jones) delivered birds to Hefner (T 542). Hefner was the witness who contacted Mrs. Miller, the juror. Hefner testified he told the juror that Jone's testimony on delivery of birds to him (Hefner) was true (T 718-719). Mrs. Miller testified that Hefner's extra-judicial statements gave her the impression Jone's testimony was true (T 744). The result was corroboration of a principal witness's testimony. It is hard to conceive of a more prejudicial error. If the juror received the impression part of Jone's testimony was true, the inference arises that the juror believed the whole of said testimony to be true. The testimony of Jones was related to a number of substantive offenses, as well as overt acts indicating a conspiracy (T 493-555).

The failure of the juror to inform the trial court of the incident when it happened is an indication of guilty knowledge. Certainly the juror knew of the impropriety of the acts, why else would she be "scared to death" when questioned about the events (T 732). The juror's explanation that it resulted from stupidity doesn't overcome the presumption of prejudice. To so hold is to destroy the heart of Anglo-American justice, the jury system.

It is within the discretion of the trial court to decide if the misconduct was prejudicial. But, this discretion is narrowly confined by the need to maintain the sanctity of the jury system. The presumption of prejudice to defendants in a criminal case should not be lightly laid aside. To do so is to deprive defendants of their basic safeguard.

The court should consider the juror's misconduct as prejudicial to appellants. In a criminal prosecution all doubts should be resolved in favor of a defendant. To overcome the presumption of prejudice, the Government must prove beyond a reasonable doubt that the misconduct was of no

effect. Certainly there is more than a reasonable doubt when the effect of the misconduct was to corroborate the testimony of a key witness for the prosecution.

The possibility of prejudice was great in the case. The trial was long. There were a large number of defendants. The offenses charged were many. The evidence was voluminous. In light of these facts it would be difficult to say that the misconduct was not prejudicial.

V.

CONCLUSION

The appellants specify five separate grounds for reversal of their convictions. Any one of the errors, standing alone, compels a reversal. Any one of the errors was prejudicial.

An indictment failing to state an offense forces the defendants to trial without a proper chance to prepare a defense.

Conviction of a felony under a general law, whe a specific law makes the offense a misdemeanor results in greater punishment than is specified.

Failure to compel the Government to elect whic evidence they chose to rely upon to prove the offenses charged in the indictment deprived the appellants of their right to a unanimous verdict on each particular offense.

Conviction under a statute not covering the alleged offense is void.

Misconduct of a juror deprived appellants of their right to trial by an impartial jury.

It is respectfully submitted that this Honorable Court should reverse the convictions of all appellants on all counts.

Respectfully submitted,

CLIFFORD L. DUKE, JR.

Attorney for Appellants:

Fred W. Steiner
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George Todd and
Charles Walker.

AFFIDAVIT OF SERVICE BY MAIL

UNITED STATES OF AMERICA)
) SS.
SOUTHERN DISTRICT OF CALIFORNIA)

MARY F. ANDERSON, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of San Diego County, California; that her business address is Suite 400, U. S. National Bank Building, Second Avenue and Broadway, San Diego, California; that she is over the age of eighteen years, and is not a party to the above-entitled action;

That on May 10, 1955, she deposited in the United States mail at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, three copies of:

APPELLANTS' OPENING BRIEF

addressed to : Laughlin E. Waters
United States Attorney
Southern District of California
Federal Building
Los Angeles, California

his last known address, at which place there is a delivery service of mail from the United States Post Office.

SUBSCRIBED AND SWORN to before me, this 10th day of May, 1955.

Notary Public in and for County of San Diego, State of California